

No. PD-1362-18

IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS  
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**Dewey Dewayne Barrett, Appellant**

**v.**

**The State of Texas, Appellee**

Appeal from Smith County

\* \* \* \* \*

**STATE PROSECUTING ATTORNEY'S  
BRIEF AS AMICUS CURIAE**

\* \* \* \* \*

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No. PD-1362-18

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

**Dewey Dewayne Barrett, Appellant**

**v.**

**The State of Texas, Appellee**

Appeal from Smith County

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

An assault trial should be about the intentionally, knowingly, or recklessly caused bodily injury the State wants to prosecute, and no other.

STATEMENT OF THE CASE

This Court granted review on its own motion on three grounds:

1. Did the court of appeals err in holding that misdemeanor assault by striking in the face was not a lesser-included offense of family violence assault by impeding breath or circulation?
2. Do multiple physical injuries inflicted in a single attack constitute separately actionable crimes of assault or are they part of a single assault?
3. Should *Irving v. State*, 176 S.W.3d 842 (Tex. Crim. App. 2005), be overruled in light of other developments in our caselaw?

Focusing on the second ground should settle the first and third.

## SUMMARY OF THE ARGUMENT

The unit of prosecution for bodily injury assault should be the bodily injury, as that term is defined and commonly understood. This will streamline the lesser-included analysis in many cases, as no discrete injury is included within a different discrete injury. That is true with any injury, not just those that are statutorily defined.

## ARGUMENT

I. This Court appears open to varying unit-of-prosecution options for assault.

In *Johnson*, the Court reiterated that the manner and means of a result-oriented offense like aggravated assault is inconsequential because “the focus or gravamen [is] the victim and the bodily injury that was inflicted.”<sup>1</sup> It also said, “Separate crimes of aggravated assault could be based upon separately inflicted instances of bodily injury.”<sup>2</sup> “Bodily injury” is defined as “physical pain, illness, or any impairment of physical condition.”<sup>3</sup> If these sentences are taken in isolation, *Johnson* would stand for the simple proposition that the Legislature made each discrete pain, illness, or impairment inflicted a separate offense. At the least, it would permit prosecution for each injury that was inflicted by a separate act.

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<sup>1</sup> *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012).

<sup>2</sup> *Id.* at 298.

<sup>3</sup> TEX. PENAL CODE § 1.07(a)(8).

But *Johnson* qualified the second statement with a footnote disclaiming any intent to decide “whether ‘bodily injury’ . . . consists of each discrete harm suffered by the victim or consists of all damage suffered by the victim in a single transaction.”<sup>4</sup> And the Court expressed uncertainty over whether pleading and proving different injuries would give rise to a variance “significant enough to be material.”<sup>5</sup> If the “separately inflicted instance of bodily injury” were the gravamen, there would be no doubt that it was material. In essence, this Court said that “bodily injury,” when used to describe the focus or gravamen of assault, might not be the same “bodily injury” that is defined in the Penal Code and is an element of assault.

II. The unit of prosecution for bodily-injury assault should be each discrete injury.

The discrete occurrence of pain, illness, or impairment should be the gravamen of assault. There is no reason why two acts that give rise to two injuries, even in rapid succession, cannot give rise to two prosecutions. But the result should be the same for a single act that causes two injuries, like a punch that breaks the victim’s jaw and causes him to fall, breaking his arm. A broken jaw and broken arm are separate injuries. They deserve separate convictions.

*Johnson*’s suggestion that each instance of bodily injury be “separately inflicted” might have its advantages but it is unsupported by the statute or this Court’s

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<sup>4</sup> *Johnson*, 364 S.W.3d at 298 & n.45.

<sup>5</sup> *Id.* at 298.

approach to gravamina. Assault is a result-oriented offense. Other than assault by impeding or occlusion,<sup>6</sup> there is no requirement that the injury be caused by specific conduct. Defining the unit of prosecution for a result-oriented offense by the act causing it—a fact that is never material for sufficiency purposes<sup>7</sup>—makes little sense.

Moreover, the alternative suggested in *Johnson*'s footnote produces multiple absurd results. Making the unit of prosecution for assault all the harm suffered in a single transaction creates a perverse incentive for the actor to inflict more harm of the same degree. If you slap someone, you might as well kick them. If you break someone's arm, you might as well gouge an eye out. The Legislature would not have intended that result. This "collective harm" theory is also at odds with the Legislature's explicit permission to prosecute the same assaultive conduct under both assault and another section of the Penal Code.<sup>8</sup> It would be absurd to hold that a defendant could be charged under assault and, *e.g.*, injury to a child for the same injury<sup>9</sup> but not charged twice for assault for two discrete injuries.

To be clear, stating the unit of prosecution in such stark terms has its own complications. Even pedestrian cases will require the parties to be mindful of

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<sup>6</sup> TEX. PENAL CODE § 22.01(b)(2)(B).

<sup>7</sup> *Johnson*, 364 S.W.3d at 298.

<sup>8</sup> TEX. PENAL CODE § 22.01(g).

<sup>9</sup> TEX. PENAL CODE § 22.04(h) is worded similarly but with a requirement of concurrent sentences.

unanimity and request elections as necessary. And there is always the potential that some prosecutor will go too far trying to maximize the number of convictions. What if a prosecutor charges one count of assault for every scrape, bump, or bruise caused by a single shove to the ground? Should it be the courts' or the jury's duty to regulate potential overreach?<sup>10</sup> One can also imagine factual scenarios in which rapid, repeated blows to the same body part occur before the pain of the first blow is likely to set in. Could a victim or even expert credibly isolate the pain or impairment attributable to each blow? As unattractive as these issues can be, however, a unit of prosecution based on discrete injury is by far the best option available.

III. "Unit of prosecution" should be the threshold issue to "lesser-included" analysis.

The State, in its opening brief, correctly points out that, post-*Hall*, all considerations of the evidence are put off until the second prong. This case, and pre-*Hall* cases like *Irving* and *Campbell v. State*,<sup>11</sup> show why that should not be the case when there is a "unit of prosecution" issue.

The two-step test set forth in *Hall v. State*<sup>12</sup> is a familiar one. The first step, a question of law, is to determine whether the elements of the alleged lesser offense are

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<sup>10</sup> See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) ("[The jury's] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction.").

<sup>11</sup> *Campbell v. State*, 149 S.W.3d 149 (Tex. Crim. App. 2004).

<sup>12</sup> 225 S.W.3d 524 (Tex. Crim. App. 2007).

included in the charged offense as pled, including factual averments.<sup>13</sup> The evidence presented at trial “comes into play only in the second prong of the test,”<sup>14</sup> in which the trial court determines whether there is evidence that establishes the lesser-included offense as a valid, rational alternative to the charged offense.<sup>15</sup>

Postponing consideration of the facts until the second step makes sense in the usual case because the conflict is usually over how a discrete criminal event—be it prohibited conduct or result—occurred. Once everyone agrees (or it has been settled) that what the defendant wants is legally a lesser-included offense, the only question is whether the evidence entitles him to a submission on his version of events.<sup>16</sup> But sometimes it is clear that the parties are talking about different offenses as measured by the unit of prosecution. This should make *Hall* analysis unnecessary because a different unit of prosecution is never a lesser-included offense. *Campbell* is a good example of this.

Campbell denied possessing the 8.64 grams of methamphetamine police found in his car (and for which he was charged) but admitted he had less than one gram of

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<sup>13</sup> *Id.* at 535.

<sup>14</sup> *Wortham v. State*, 412 S.W.3d 552, 557 (Tex. Crim. App. 2013).

<sup>15</sup> *Hall*, 225 S.W.3d at 536.

<sup>16</sup> The State does not have to identify evidence that the defendant is guilty only of the lesser-included offense. *Grey v. State*, 298 S.W.3d 644, 650-51 (Tex. Crim. App. 2009).

methamphetamine in a separate location that same day.<sup>17</sup> He wanted an instruction on the lesser amount as a lesser-included offense.<sup>18</sup> This Court rejected his claim. “The mere fact that the language in an indictment technically covers two instances of conduct . . . does not mean that each instance is part of the same criminal act for which the Appellant was indicted.”<sup>19</sup> “The real question is whether there is a single act of possession, or two separate acts of possession.”<sup>20</sup> The evidence clearly showed two separate acts, and so one was not included in the other.<sup>21</sup>

This makes sense. When the State and defense are talking about separate crimes, the right approach is to stop the “lesser” analysis before it begins. Although it can be assumed that the correct result would be arrived at either way the problem is approached, beginning with a “unit” analysis avoids a sometimes-complicated comparison of the pleadings and elements at Step 1 of *Hall*. It also aligns this framework with this Court’s double jeopardy, jury-unanimity (and thus election), and material variance jurisprudence, all of which utilize units of prosecution.<sup>22</sup> The simplest solution is usually the best solution.

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<sup>17</sup> *Campbell*, 149 S.W.3d at 150-51.

<sup>18</sup> *Id.* at 151.

<sup>19</sup> *Id.* at 154.

<sup>20</sup> *Id.* at 155.

<sup>21</sup> *Id.* at 155-56.

<sup>22</sup> *Johnson*, 364 S.W.3d at 296.

IV. *Irving* was rightly decided, both in procedure and outcome.

Like *Campbell*, *Irving* should be approached and decided the same way post-*Hall*. The State charged Irving with aggravated assault for hitting the victim in the arm and head with a baseball bat under theories that the bat was a deadly weapon that caused serious bodily injury.<sup>23</sup> Irving wanted an assault charge based on different conduct and attributed the victim's serious injuries to a fall he played no part in.<sup>24</sup> The proper response when a defendant wants to make an assault trial about a different injury than what the State charged is a swift denial without resort to elemental or cognate pleading analysis.

V. Hitting someone in the face is a different offense from family violence assault by impeding breath or circulation.

The result should be the same with “impeding” or “occlusion” assault. Even if both the injury and manner and means were not statutory and presumably binding on both parties,<sup>25</sup> hitting someone in the face causes a different injury than impeding one's breathing or circulation. It should not take a *Hall* analysis to see that.

Like Irving, a defendant who asks for a charge on a different injury is not asking for a lesser-included offense, he's attempting to hijack the prosecution. He's

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<sup>23</sup> *Irving v. State*, 176 S.W.3d 842, 845 & n.9 (Tex. Crim. App. 2005).

<sup>24</sup> *Irving v. State*, No. 09-02-476CR, 2003 WL 22736207, at \*2 (Tex. App.— Beaumont Nov. 19, 2003) (not designated for publication).

<sup>25</sup> See *Johnson*, 364 S.W.3d at 298 (variances involving statutory language that defines the offense are always material).

not saying “I did the same thing in a different way,” or “I did most of what is alleged but not all of it.”<sup>26</sup> He’s saying “I didn’t do the serious crime they’ve charged but I did something else less serious I’d rather be convicted of.” That’s a denial with an extraneous admission, not a justification for a “lesser” instruction.

## VI. Conclusion

“It is the State, not the defendant, that chooses what offense is to be charged.”<sup>27</sup> As such, “the defendant cannot foist upon the State a crime the State did not intend to prosecute in order to gain an instruction on a . . . a lesser included offense.”<sup>28</sup> But that’s what would happen if a defendant got a “lesser” instruction on a separate injury, regardless of whether the State’s chosen injury is statutory. This Court can prevent that by making the unit of prosecution for bodily injury assault each bodily injury. And it can simplify many lesser-included analyses by making “units” the threshold consideration.

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<sup>26</sup> For example, if the defendant said he applied pressure to the victim’s throat and impaired her breathing or circulation but did not have the requisite relationship, he should receive an instruction on a lesser-included offense.

<sup>27</sup> *Grey*, 298 S.W.3d at 650.

<sup>28</sup> *Bufkin v. State*, 207 S.W.3d 779, 781 (Tex. Crim. App. 2006).

**PRAYER FOR RELIEF**

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,003 words.

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 25<sup>th</sup> day of February, 2020, a true and correct copy of the State's Brief as Amicus Curiae has been eFiled or e-mailed to the following:

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